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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,
Petitioner,

versus

BAYOU STEEL CORPORATION,
Respondent,

and

HARRY ABADIE, JR., et al.,
Respondents.

On Petition for Writ of Certiorari
To The Louisiana Supreme Court

BRIEF FOR RESPONDENT, BAYOU STEEL CORPORATION, IN OPPOSITION

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QUESTIONS PRESENTED

This action presents no federal statutory or constitutional question. The only question presented is one purely of state law: whether, in the decisions below, the administrative tribunals and the Louisiana courts properly denied unemployment compensation to striking former employees of Respondent, Bayou Steel Corporation, under a Louisiana statute that disqualifies individuals from receiving benefits when their "unemployment is due to a labor dispute which is in active progress" at their place of employment. La. Rev. Stat. Ann.§ 23:1601(4) (West 1985).

PARTIES

Petitioner, Gayle F. Truly, is the Secretary of the Louisiana Department of Labor and Administrator of the Louisiana Office of Employment Security.

Respondent, Bayou Steel Corporation, is a Delaware corporation, qualified and doing business in the State of Louisiana. There are no parent companies or subsidiaries (except wholly owned subsidiaries) of Bayou Steel Corporation that are required to be listed under Supreme Court Rule 29.1.

Respondents, Harry Abadie, Jr., et al., are striking employees of Bayou Steel Corporation, who are claimants for unemployment compensation under the Louisiana unemployment compensation law. Their interests in the proceedings below were aligned with the Petitioner.

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No. 94-1821

In The

Supreme Court of the United States

October Term, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,
Petitioner,

versus

BAYOU STEEL CORPORATION,
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and

HARRY ABADIE, JR., et al.,
Respondents.

On Petition for Writ of Certiorari
To The Louisiana Supreme Court

BRIEF FOR RESPONDENT, BAYOU STEEL CORPORATION, IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

For the reasons stated below, Respondent, Bayou Steel Corporation ("Bayou Steel" or the "Company"), respectfully requests that this Court deny the petition for writ of certiorari filed by Petitioner, Gayle F. Truly, Secretary of the Louisiana Department of Labor and Administrator of the Louisiana Office of Employment Security ("Petitioner" or "Administrator").

OPINIONS BELOW

On March 21, 1993, after commencing a strike against their employer, Bayou Steel, Respondents, Harry Abadie, Jr., et al (the "Strikers" or "claimants"), filed claims for unemployment benefits with the Louisiana Office of Employment Security. The Strikers' claims initially were denied, but, on May 4, 1993, the Administrator arbitrarily reversed the initial determination and awarded benefits. Bayou Steel appealed, and a hearing was conducted before an administrative law judge ("ALJ") of the Louisiana Department of Labor. On July 9, 1993, the ALJ reversed the Administrator's award of benefits and disqualified the Strikers from receiving unemployment compensation. The Strikers then appealed to the Louisiana Board of Review, which, on August 4, 1993, affirmed the ALJ's decision. The Strikers next filed a petition for judicial review with the 40th Judicial District Court for the Parish of St. John the Baptist, naming both Bayou Steel and the Administrator as defendants.[1] On December 28, 1994, the district court affirmed the decision of the Board of Review, and the Strikers and the Administrator appealed to the Louisiana Fifth Circuit Court of Appeal. On October 25, 1994, the court of appeal affirmed the judgment of the district court, Abadie v. Bayou Steel Corp., 645 So. 2d 779 (La. Ct. App. 1994), and the Strikers and the Administrator filed petitions for writs of review to the Louisiana Supreme Court. On February 2, 1995, the Louisiana Supreme Court denied the petitions, finding the decisions below not worthy of further review. Abadie v. Bayou Steel Corp., 649 So. 2d 403 (La. 1995).

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[1]Although the Louisiana statutory procedure governing judicial review of unemployment compensation decisions required the Strikers to name the Administrator as a co-defendant with Bayou Steel, the position of the Administrator in this matter clearly was aligned with that of the Strikers.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257 (West 1993). This Court, however, lacks jurisdiction over this action because it presents no genuine issue under any federal statute and raises no significant claim under the United States Constitution or 42 U.S.C.A. § 1983 (West 1994). Indeed, this Court, in similar contexts, has rejected all of Petitioner's contentions. See, e.g., Baker v. General Motors Corp., 478 U.S. 621 (1986); New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No federal constitutional provisions or statutes are involved in this case. This matter exclusively involves a Louisiana statute, La. Rev. Stat. Ann § 23:1601(4) (West 1985), which states, in pertinent part:

> An individual shall be disqualified for [unemployment compensation] benefits:
>
> (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

STATEMENT OF THE CASE

I. Clarification of Misrepresentations in Petitioner's Statement of the Case

Conspicuously absent from Petitioner's statement of the case is any reference to the most critical fact: the claimants for whom Petitioner seeks authority to award unemployment benefits are unemployed because *they are on strike*. They are unemployed because they have chosen to picket rather than to work. Therefore, because the claimants' unemployment is due to a labor dispute that is in active progress and in which they are participating, they are disqualified, under the Louisiana statute, from receiving unemployment compensation. While these facts are central to the Louisiana administrative and judicial decisions from which Petitioner seeks to appeal, one would never know, from reading the Administrator's petition and brief, that the claimants are on strike. Rather, Petitioner states that the claimants were disqualified, in the decisions below, solely because they are union members whose "contract of hire" (the collective bargaining agreement) has expired. Rather than acknowledge the claimants' voluntary strike as the reason for their unemployment, Petitioner states, as if it were a matter of fact, that the Strikers are unemployed solely because their collective bargaining agreement (which Petitioner calls a "contract of hire") has expired. Petitioner's statement of the case is a blatant misrepresentation of the facts of this case and of the holdings of the decisions below.

II. Respondent's Statement of the Case

The following facts are established by the record and form the basis of the decisions below. On March 21, 1993, more than three-hundred employees represented by Local 9121 of the United Steel Workers of America (the "Union") voluntarily commenced an economic strike against their employer, Bayou

Steel. For several months prior to the strike, Bayou Steel and the Union had been engaged in negotiations for a new collective bargaining agreement. When the old agreement expired in February 1992, it was extended by mutual agreement through March 21, 1993. On March 19, 1993, the Union notified the Company that the Union would not agree to another extension of the agreement and that the employees would commence a strike when the then current extension expired two days later. Before they commenced their strike, the Strikers were instructed by the Union to file claims for unemployment compensation with the Louisiana Office of Employment Security. The first claims were filed on March 21, 1993, the day the strike began.

No negotiating impasse was ever declared. Thus, when the final contract extension expired and the strike began, the Company continued to employ all bargaining-unit employees who chose not to join the strike under the same terms and conditions, at the same rates of pay, with the same benefits provided under the expired agreement. In addition, every striking employee who elected to cross the picket line and return to work was reinstated under the terms of the expired agreement, and all replacement workers hired after the strike began were hired under the terms of the expired agreement.

In summary, although the Strikers could have continued their employment with Bayou Steel under the terms of the expired agreement, they chose to go on strike. Although work was available, they chose to be unemployed. Under these circumstances, Louisiana law disqualifies the Strikers from receiving unemployment benefits.

REASONS FOR DENYING THE WRIT

I. None of Petitioner's Arguments Warrant Review by this Court.

As indicated above and as is evident throughout the Administrator's petition and brief, the cornerstone of all of Petitioner's arguments is the false notion that the expiration of the collective bargaining agreement between Bayou Steel and the Union caused the Strikers' unemployment. This notion defies the facts as found in the decisions below:

> In this case, the claimants refused to accept an extension of the expiring contract. An extension would have allowed them to continue working as they had for the prior six year period, while negotiations for a new contract continued. Rather, the claimants elected to strike.

Abadie v. Bayou Steel Corp., 645 So. 2d 779, 782 (La. Ct. App. 1994), writ denied, 649 So. 2d 403 (La. 1995). Because the expiration of the collective bargaining agreement did not cause the Strikers' unemployment, all of Petitioner's arguments fail. For this reason alone, the Administrator's petition for writ of certiorari should be denied.

II. Louisiana's Unemployment Compensation Scheme is Neither Preempted By Nor In Conflict With Federal Law.

Petitioner first argues that the Federal Unemployment Tax Act and the Social Security Act preempt state unemployment compensation law and, in particular, the eligibility criteria established by the Louisiana legislature in La. Rev. Stat. Ann. § 23:1601(4) (West 1985). This Court squarely and unequivocally

rejected this argument nearly 20 years ago in Ohio Bureau of Employment Services. v. Hodory, 431 U.S. 471 (1977). There this Court stated: "The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area." Id. at 488-89. Since then, this Court repeatedly has held that "the several States . . . have broad freedom in setting up the types of unemployment compensation that they wish," and that the states are free to "fashion[] their own unemployment compensation programs and especially their own eligibility criteria." New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 537, 539 (1979). See also Baker v. General Motors Corp., 478 U.S. 621 (1986).

These decisions make it abundantly clear that the states are free to establish eligibility criteria for the receipt of unemployment benefits that either include or exclude strikers. New York Telephone, 440 U.S. at 544; Hodory, 431 U.S. at 487. By enacting La. Rev. Stat. Ann. § 23:1601(4) (West 1985), the Louisiana legislature has declared strikers ineligible for the receipt of unemployment benefits. Petitioner's relief from the decisions below, therefore, lies not with this Court, but with the Louisiana legislature.

Petitioner further argues that the decisions below erroneously relied on the National Labor Relations Act ("NLRA") in ascertaining whether the Strikers were employed or unemployed for purposes of their eligibility for unemployment compensation under Louisiana law. The only reference to the NLRA in the decisions below is the recognition, in dicta, that economic strikers have the right to reinstatement, upon application, as jobs become available. See, e.g., Abadie v. Bayou Steel Corp., 645 So. 2d 779, 782 (La. Ct. App. 1994) (citing NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967)), writ denied, 649 So. 2d 403

(La. 1995). From this observation, Petitioner wrongly concludes that the courts below have placed the Strikers in some sort of perpetual state of "artificial employment" that permanently disqualifies them from receiving unemployment benefits. The irony is that it is Petitioner who would create an *artificial state of unemployment*, resulting in an immediate award of benefits, upon the expiration of the collective bargaining agreement, notwithstanding the fact that the Strikers continued to work under the terms of the expired agreement for several more weeks before deciding to go on strike.

It is obvious that the Louisiana courts did not rely on the NLRA in determining the eligibility of the Strikers for benefits under the Louisiana unemployment compensation law. Rather, the courts below expressly held that the Strikers were *unemployed* due to their participation in a labor dispute in active progress at their former place of employment and that they were ineligible for unemployment benefits under the Louisiana statute for that reason.

III. Denial of Benefits to Striking Workers Does Not Violate the Equal Protection Clause.

Petitioner's next point is that the denial of benefits to individuals participating in and interested in a labor dispute constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. Again, this Court previously has rejected this argument in a similar context. Hodory, 431 U.S. at 489-93. Indeed, this Court has held that the denial of benefits to striking employees is rationally related to legitimate state interests. Id. at 490-93; cf., Lyng v. UAW, 485 U.S. 360, 370-74 (1988) (denial of food stamps to striking workers does not violate Equal Protection Clause).

Because an unemployment compensation statute "does not involve any discernible fundamental interest," and because

striking workers are not a suspect class, the rational relation test applies to determine the constitutionality of Louisiana's unemployment compensation scheme. Hodory, 431 U.S. at 489; see also, Lyng, 485 U.S. at 370 n.8. Under the rational relation test, a statute is constitutional if it has a rational relation to a legitimate state interest. The Louisiana Supreme Court has recognized that the legitimate state interest in the statute at issue in this case is the need for the state to remain neutral in labor disputes by not forcing employers to finance strikes by their employees through an award of unemployment benefits by the state from a fund to which employers are required to contribute. National Gypsum Co. v. Administrator, 313 So. 2d 230, 233 (La.), appeal dismissed, 423 U.S. 1009 (1975). Louisiana's statutory disqualification of striking workers from receiving unemployment compensation clearly and rationally relates to this legitimate state interest.

Moreover, contrary to Petitioner's argument, Louisiana's unemployment compensation scheme does not result in unequal treatment of union and non-union workers. All of the disqualification provisions treat both the same. If either participates in a labor dispute by going on strike, he is denied benefits. If either chooses not to work for reasons unrelated to a labor dispute, he is denied benefits.[2] Similarly, if the union worker's collective bargaining agreement expires or the non-union worker's employment contract terminates and the employer discharges the employee or fails to offer further employment on the same or similar terms (unlike here), benefits are available;[3]

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[2]See La. Rev. Stat. Ann. § 23:1601(1), which disqualifies an unemployment compensation claimant if he quits "without good cause attributable to a substantial change made to the employment by the employer."

[3]See La. Rev. Stat. Ann. § 23:1601(2), which disqualifies an unemployment compensation claimant who has been discharged only if "he has been discharged...for misconduct connected with his employment."

but if either has the opportunity to continue working and fails or refuses (as here) to do so, benefits are denied.[4] In arguing that union and non-union workers are treated differently in the latter situation, Petitioner reveals a profound confusion about the fundamental differences between a collective bargaining agreement and an ordinary employment contract and about what happens when a collective bargaining agreement expires and the parties are still negotiating over the terms of a new agreement.

The Petitioner's assertion that bargaining-unit employees are "discharged" when a collective bargaining agreement expires is flatly wrong. Rather, in the absence of a negotiating impasse, federal law requires the employer to continue to offer employment to the employees under the same terms and conditions as were contained in the expired contract until a new agreement is reached. See, e.g., Litton Financial Printing v. NLRB, 501 U.S. 190, 198 (1991); Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.5, 544 n.6 (1988). Thus, in the absence of a lockout, when a collective bargaining agreement expires, the choice to continue working or not to work belongs to the employees. In this situation, if the employees choose to go on strike (i.e., choose not to work), they are ineligible for unemployment benefits. Similarly, when an individual employment contract expires, although the employer has no obligation to renew it or to continue its terms, if he does, the choice to work or not to work belongs to the employee. If the employee chooses not to continue the relationship, he quits, and benefits are not available. On the other hand, if, following the expiration of a collective bargaining agreement, the employer engages in a lockout, it is the employer's action that causes the unemployment, and, therefore, benefits are available. See Daigle v. Francis, No. 35949 (La. 29th J. Dist. Ct. Apr. 25, 1991) (copy included in Respondent's App. at A-3). Similarly, if, following

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[4]La. Rev. Stat. Ann. § 23:1601(1) and (4).

the expiration of an individual employment contract, the employer fails to offer a new agreement and, instead, discharges the employee, benefits are available. Thus, whether the situation involves a union worker covered by a collective bargaining agreement or a nonunion worker with an individual employment contract, the analysis for unemployment compensation purposes is really no different. It all comes down to why the employees are unemployed: Is it because they had a choice and chose not to work, or is it because they had no choice?

Although the respective rights and obligations of Bayou Steel and the Strikers under federal labor law had nothing to do with the denial of benefits in the decisions below, what was central to the decisions is that the Strikers chose not to continue working. The expiration of the collective bargaining agreement between Bayou Steel and the Union had nothing to do with the decisions below because it was not the cause of the Strikers' unemployment. Likewise, the fact that they were union members was irrelevant. The Strikers could have continued to work had they chosen to do so (like many of their co-workers). Instead, they chose to strike. Their decision not to work was the sole basis of the decisions below.

IV. Denial of Benefits to Striking Workers Does Not Violate Procedural Due Process.

In arguing that the denial of benefits to striking workers violates procedural due process, Petitioner again relies on the unfounded allegation of discrimination between union and non-union workers by the Louisiana courts. Indeed, Petitioner asserts that, under the statutory procedure for determining a claimant's eligibility as applied by the Louisiana courts, "the union-affiliated claimant is automatically disqualified." According to Petitioner, as a result of judicial interpretation, the only inquiry that will be

permitted in future unemployment cases is whether the claimants are members of a union. Petitioner's assertion is false and displays either a deliberate misreading or a profound misunderstanding of the decisions below and of the Louisiana unemployment compensation statute. Neither the unemployment compensation law nor the decisions below make any mention of consideration of a claimant's union or non-union status in deciding on a claim for benefits. Moreover, the Louisiana courts have never "automatically disqualified" a claimant because of his union status. Indeed, when the circumstances have been nondisqualifying under the statute, Louisiana courts have awarded unemployment benefits to union workers, even during labor disputes. See, e.g., Greyhound Lines, Inc. v. Strong, No. 79525 (La. 22nd J. Dist. Ct. Aug. 30, 1985) (union workers awarded benefits because employer forced employees' strike by unilateral implementation of drastic reductions in wages in benefits) (copy included in Respondent's App. at A-1); Daigle v. Francis, No. 35949 (La. 29th J. Dist. Ct. Apr. 25, 1991) (benefits awarded to union workers because their unemployment was caused by employer's lockout, not by workers' voluntary decision to strike) (copy included in Respondent's App. at A-3).

Simply put, before an award of benefits can be made or a claim can be denied, Louisiana law requires an examination of the cause of a claimant's unemployment, whether the claimant is union or not. Such an examination was undertaken in this case. The Strikers' claims for benefits were considered and reviewed fully by an administrative law judge following a lengthy trial, then by the Board of Review followed by the state district and appellate courts and, finally, by the Louisiana Supreme Court. The decisions to disqualify the Strikers turned on the fact that they were unemployed due to their voluntary participation in a strike, not that they were union members. There was no "automatic" disqualification of the Strikers because of their union status. They were disqualified, in accordance with the statute, because they chose to go on strike.

V. There Has Been No Infringement of the Requirement of Prompt Payment.

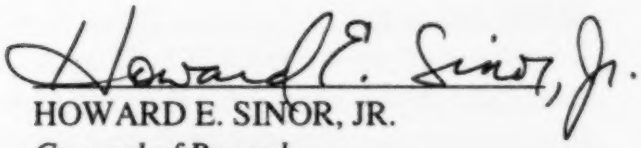
Petitioner's argument that the Strikers' rights to prompt payment of benefits under the Social Security Act and California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), have been infringed makes no sense. First, the argument is premised on the false assumption that an award of benefits to the Strikers is contingent on some unspecified action by the National Labor Relations Board ("NLRB"). Second, Petitioner's argument that the Strikers are not receiving their benefits "when due" assumes wrongly that the Strikers are entitled to benefits.

Manifestly, an award of benefits under Louisiana's unemployment compensation law does not depend on any action by the NLRB. The consideration of the Strikers' claims for benefits in this case was not delayed pending the outcome of any unrelated NLRB proceedings. Rather, the Strikers' claims for benefits were promptly and timely considered at all levels. As indicated above, the Strikers' claims were filed on March 21, 1993. Although the claims initially were denied, the Administrator reconsidered the issue on May 4, 1993 and awarded benefits retroactive to the date of filing. Benefits then were paid promptly and continued to be paid (albeit wrongfully) even while Bayou Steel appealed the award to the ALJ. Although the claimants have not received any benefits since the ALJ found they were disqualified, it is not because their right to "prompt payment" has been infringed; rather, it is because, under Louisiana law, they are not entitled to any benefits.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. This case involves exclusively state law issues. There is no federal question or significant constitutional issue present that requires the attention of this Court.

Respectfully submitted,



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TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

NUMBER 79525 DIVISION "A"

GREYHOUND LINES, INC.,
VERSUS
ARTHUR T. SPRONG, AND LOUISIANA
DEPARTMENT OF EMPLOYMENT SECURITY,
GEORGE WHITFIELD, ADMINISTRATOR

CONSOLIDATED WITH

NUMBER 79506 DIVISION "C"

GREYHOUND LINES, INC.
VERSUS
CHARLES ABERNATHY, ET AL, AND THE
DEPARTMENT OF EMPLOYMENT SECURITY,
GEORGE WHITFIELD, ADMINISTRATOR

FILED: AUG. 30, 1985 /S/JEANICE A. LANDWEHR,
DEPUTY CLERK

REASONS FOR JUDGMENT

This is an appeal by Greyhound Lines, Inc., from an adverse ruling by the Department of Employment Securites granting striking employees unemployment for the time during which they walked the picket line. The appeals referee described the issue for the Court in his opinion after a hearing held on November 9, 1985, as follows:

> ....."The issue in this case is not whether the claimants participated in or were interested in the outcome of a labor dispute in active progress at their last place of employment. There is no

> question but that these claimants walked the picket line and did participate in the labor dispute. They were, of course, interested in the outcome of the labor dispute. The question in this case is whether their unemployment was caused by the labor dispute..."

The Court may not disturb the findings of the referee and Board unless those findings are not supported by the record. The jurisdiction of the Court only extends to questions of law. Vancouver Plywood Co., Inc., v. Sumrall, 415 So. 2d 625, (La. App. 3rd Cir. 1982). The referee found that the work stoppage was not caused by a labor dispute but by the institution of a unilateral pay and benefits cut by Greyhound. This Court finds that the findings and conclusions of the referee and Board of Review are such that it cannot disturb them.

Accordingly, the decision of the Board of Review is affirmed.

This Court will sign a judgment in accordance with these reasons when one is presented to it.

Covington, Louisiana, this 29 day of August, 1985.

/s/ Thomas W. Tanner, Judge
Division "C"

ERROL V. DAIGLE
VERSUS
B. J. FRANCIS, et al
NUMBER: 35,949

29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA
DIVISION: D

REASONS FOR JUDGMENT

This is an appeal from the Louisiana Board of Review's adjudication that petitioner is disqualified from receiving unemployment insurance benefits because of his involvement in a "labor dispute" during the March 4, 1989 strike of Eastern Airlines, Inc. employees.[1]

La. R.S. 23:1601(4) provides in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . .
>
> (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory; establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

Plaintiff is a member of the International Association of Machinists, Local 1905, which represents him in collective bargaining with Eastern Airlines. He contended he is exempt from the labor dispute disqualification since his unemployment

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[1] The present case involves only one claimant, Errol Daigle, who is a resident of St. Charles Parish.

resulted not from a labor dispute but from an offensive employer lockout unilaterally initiated by Eastern, and a drastic change in working conditions. Eastern contended, the Appeals Referee held and the Board of Review affirmed, that the unemployment was caused by a labor dispute.

The findings of fact, as determined by the appeals tribunal and adopted by the Louisiana Board of Review, are as follows:

> All of the claimants worked for the named employer at New Orleans International Airport with the exception of Mr. James R. Cranford who was last employed in Atlanta, Georgia. They worked in various capacities as mechanics, ramp service personnel and cleaners. They were all represented by the International Association of Machinists, and they belonged to Local Union 1905 in New Orleans.
>
> The contractual agreement between the International Association of Machinists Union and the employer expired on December 31, 1987. The employer was requesting that the union members accept lower rates of pay and lesser benefits while the union was requesting an eight percent increase in pay over a three year period for its members.
>
> No agreement could be reached, so it was determined on February 1, 1989, that the parties were at an impasse. It was agreed that the parties would continue with the "status quo" for a thirty-day "cooling off period" which would expire at 12:01 a.m. on March 4, 1989.

On February 14, 1989, a national vote was taken, and the union voted to go on strike if no agreement could be reached.

On March 3, 1989, the employer received permission from the United States District Court in Miami, Florida, to relieve union members of their duties for that day by putting them on an unscheduled paid holiday. At approximately 9:15 a.m. (CDT) those claimants who were working at the employer's location in New Orleans, Louisiana, were informed by Mr. Harry Hoover, Shift Manager, or by Mr. Richard Spatifora, Manager, that they should leave the premises for the day, that they were being given an unscheduled paid holiday. The workers were allowed to obtain personal items from the lockers and from employee lounges, but they were not required to remove these objects from the premises. None of the workers were told that they should not report to work the next day. Their duties for the rest of the day were performed by management personnel and by ticket agents. Although some of the locks on various workshops and buildings had been changed, employees were told that keys would be available for them should they need them.

Contract negotiations continued throughout that day, but no agreement was reached by midnight. The union did not offer to continue the "status quo." Mr. Thomas N. Hoggatt, President of Local 1905, was notified that the union would begin striking against the employer, and he contacted other union members to begin picketing

at the airport on the morning of March 4, 1989. None of the claimants attempted to return to work. One handicapped union member did return to work and was allowed to perform his regular duties. Western Union Mailgrams were sent to each of the union members informing them that they were expected to return to their next scheduled shift after 12:01 a.m., March 4, 1989. Most of them did not receive these until several days later, but none of them returned to work. It was not until after March 6, 1989, that the striking workers received Return to Work Procedures in the mail informing them of how they could return to their jobs and of what cuts in earnings and benefits would be imposed by the employer.

A few days later, the claimants learned that the employer had filed for bankruptcy under Chapter 11, so none of them have been paid for their last week of work nor for the holiday of March 3, 1989.

None of the claimants have informed the employer that they quit their jobs. They all expect to return to work with the named employer when the strike is settled.

Based upon these findings, the administrative law judge found that claimant and his co-workers were not locked out by the employer, but that their unemployment was as a result of a labor dispute in which they were interested or participating, and they were therefore disqualified from receiving unemployment insurance benefits. The Board of Review adopted this decision.

The court's appellate review of the holding by the Board of

Review is limited to questions of law if the findings of fact are supported by sufficient evidence and in the absence of fraud. La. R.S. 23:1634. A determination of whether there was a lockout is a conclusion of law based on the facts found by the administrative law judge.

A lockout is defined in La. R.S. 23:900:

> (2) "Lockout". A refusal by an employer to permit his employees to work as a result of a dispute with such employees that affects wages, hours and other terms and conditions of employment of said employees, provided, however, that a lockout shall not include a termination of employment for reasons deemed proper under Louisiana state and federal law.

National Gypsum Company v. Administrator, Louisiana Department of Employment Security, 313 So.2d 230 (La. 1975), held that unemployment due to a lockout by the employer is not "caused by a labor dispute which is in active progress. . . ."

The facts establish the claimant and his co-workers were sent home on the last day of the cooling off period for "an unscheduled paid holiday," and according to shift manager, Harry Hoover, would not have been allowed to remain on the employment premises had they asked to continue working. Further, those employees who testified stated that as they left the employment premises they saw non-union personnel dressed in the uniforms they customarily wore and performing their duties. One employee testified that she was informed that she would receive a phone call as to further developments. Another employee testified that he was informed that he was not to return to work "until the matter was resolved." All of the employees who testified indicated that they believed they were not to return to work.

The employer had begun training salaried employees for a "self-help" plan, under which those employees would take over the responsibilities of the claimant herein and his co-workers, approximately two weeks prior to March 4, 1989 (the end of the thirty-day cooling off period), and Aircraft Services International was in the process of training new employees as of one week prior to March 4, 1989. While the Board of Review made no specific findings as to these facts, the testimony of shift manager, Harry Hoover, was uncontradicted.

Several claimants testified that they were told to clean out their lockers and take their tools with them.

The locks on operations, maintenance and air freight facilities were changed on March 2 and 3, and the employees' identification badges were invalidated. Although the workers were told "that keys would be made available for [the employees] should they need them," they were not told that they would be allowed to return to work according to their original schedules and without restrictions. When asked what would have taken place had the employees returned to work on March 4, 1989, shift manager, Harry Hoover, testified, "We were instructed that. . .when employees showed up, speaking of hourly employees, they would be sent to Mr. Spatifora's office. Mr. Spatifora was to compile a list of those employees who wanted to work and would send that list to Miami."

Although there was no specific finding as to whether the employer offered to continue the status quo, the record indicates it did not do so.

The factual findings of the administrative judge as adopted by the Board of Review, lead to the legal conclusion that the claimant's unemployment resulted from a lockout by the employer and not from the "labor dispute in active progress." Although

there was a "labor dispute in active progress" at the employment premises, the claimant's unemployment was not due to the labor dispute, but was due rather to the employer's imposition of a lockout.

Further, the uncontradicted testimony shows that the reductions sought amounted to twenty to fifty percent in wages and substantial cuts in benefits. These reductions were unilaterally imposed by the employer. An employer's offer of continuation of employment at a reduction of twenty to fifty percent is tantamount to a layoff, in which case the employees would be entitled to unemployment benefits.[2]

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[2] The issue of whether drastic reductions in pay benefits constitutes a lockout has not been addressed by Louisiana courts. However, substantial reductions, such as those involved herein, have been found to constitute good cause for resignation so as to allow receipt of unemployment compensation benefits. See Pelican Homestead Savings Ass'n v. Blache, 490 So.2d 642 (La. App. 2d Cir. 1986); Jantzen of Louisiana, Inc. v. Blache, 464 So.2d 33 (La. App. 3rd Cir. 1985); Robertson v. Brown, 139 So.2d 226 (La. 1st Cir. 1962). Further, cases from other jurisdictions are instructive on this issue. In Sunstar Foods, Inc. v. Uhlendorf, 310 N.W.2d 80 (Minn. 1981), the Minnesota Supreme Court held that reduction of wages by 21-26% is so unreasonable as to constitute a lockout. See also Local 730, v. Com., Unemp. Comp. Bd. of Rev., 480 A.2d 1000 (Penn. 1984), where the Pennsylvania Supreme Court held work stoppage following employer's refusal to maintain status quo constituted a lockout, entitling employees to unemployment compensation benefits.

The judgment disqualifying claimant from unemployment benefits must be reversed, and this case remanded for calculation of benefits.

Hahnville, Louisiana this 25th day of April, 1991.

/s/ Mary Ann Vial Lemmon, Judge